

No. 11239

N. 2440

United States  
Circuit Court of Appeals

For the Ninth Circuit.

JOE FONTES, individually and doing business as  
JOE FONTES MACHINERY COMPANY,  
LTD.,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States  
for the Northern District of California,

Southern Division

FILED  
MAR 4 1946

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the  
Northern District of California, Southern  
Division.

No. 24635-G

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Plaintiff,

vs.

JOE FONTES, individually and doing business as  
JOE FONTES MACHINERY COMPANY,  
LIMITED,

Defendants.

COMPLAINT FOR INJUNCTION AND  
TREBLE DAMAGES

Count One

1. In the judgment of the Price Administrator the defendant has engaged in actions and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2nd Sess., c. 26, 50 U.S.C.A., 901 et seq) as amended, hereinafter called the "Act," in that defendant violated Maximum Price Regulation 1, as amended—Used Machine Tools—effective in accordance with the provisions of the Act; and, therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Regulation.

2. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript.



3. At all times mentioned herein there has been in effect pursuant to the Act, Maximum Price Regulation 1, as amended, hereinafter referred to as the "Regulation," establishing maximum prices for used machine tools.

4. At all times hereinafter mentioned defendant has been and now is engaged in business in the City and County of San Francisco, State of California, selling and offering to sell used machine tools for which maximum prices are and were established by said Regulation.

5. During the year last past, defendant sold and offered to sell used machine tools at prices in excess of those established by the Regulation.

#### Count Two

1. Plaintiff as Administrator, Office of Price Administrator, brings this action for treble damages on behalf of the United States pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th cong., 2nd Sess., c. 26, 50 U.S.C.A., Appx. 212), as amended, hereinafter called the "Act."

2. Jurisdiction of this action is conferred upon the Court by Sections 205(e) and 205(c) of the Act.

3. Paragraphs 3, 4 and 5 of Count One are incorporated by reference as if set forth in full herein.

4. None of said purchases was made for use or

consumption other than in the course of trade or business.

5. Plaintiff is informed and believes and therefore alleges that three times the aggregate amount by which the prices received by the defendant in the transactions referred to in Paragraph 5 of Count One exceed the maximum prices provided by Maximum Price Regulation 1, as amended, equals an amount in excess of \$200.00. [2]

### Count Three

1. In the judgment of the Price Administrator the defendant has engaged in actions and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Con., 2nd Sess., c. 26, 50 U.S.C.A., 901 et seq) as amended, hereinafter called the "Act," in that defendant violated Maximum Price Regulation 136 (8 F. R. 16132), as amended and revised—Machinery and Transportation Equipment—effective in accordance with the provisions of the Act; and, therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Regulation.

2. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act.

3. At all times mentioned herein there has been in effect pursuant to the Act, Maximum Price Regulation 136 (8 F. R. 16132), as amended and revised, hereinafter referred to as the "Regulation,"

establishing maximum prices for machinery and transportation equipment.

4. At all times hereinafter mentioned defendant has been and now is engaged in business in the City and County of San Francisco, State of California, selling and offering to sell machines and parts and machinery services for which maximum prices are and were established by said Regulation.

5. During the year last past, defendant sold and offered to sell machines and parts and machinery services at prices in excess of those established by the Regulation.

#### Count Four

1. The allegations of paragraphs 1, 2, 3 and 4 of Count Three are incorporated herein as if set forth in full.

2. Defendant violated said Regulation in that he sold and offered to sell second-hand machines and parts without following the pricing practices as required by Section 1390.11 of the Regulation. [3]

#### Count Five

1. The allegations of paragraphs 1, 2, 3 and 4 of Count Three are incorporated herein as if set forth in full.

2. Defendant violated said Regulation in that he failed to prepare and keep for inspection by the Office of Price Administration, true, full and accurate records as required by Section 1390.26(a)(4) of the Regulation.

Wherefore, The Administrator demands:

1. A permanent and final injunction enjoining the defendant, his officers, agents, employees and attorneys, and all persons in active concert or participation with the defendant, from directly or indirectly selling, delivering or offering for sale or delivery machines and parts and machinery services and second-hand machine tools at prices in excess of those established by Revised Maximum Price Regulation 136 and Maximum Price Regulation 1, as amended, or otherwise violating or attempting or agreeing to do anything in violation of any Regulations or Orders adopted pursuant to the Emergency Price Control Act of 1942, as amended, establishing maximum prices for machines and parts and machinery services.

2. A permanent and final mandatory injunction directing and requiring the defendant, his officers, agents, employees and attorneys, and all persons in active concert or participation with the defendant, to follow the pricing practices as required by Section 12 of Revised Maximum Price Regulation 136.

3. A permanent and final mandatory injunction directing and requiring the defendant, his officers, agents, employees and attorneys, and all persons in active concert or participation with the defendant, to prepare and keep for inspection by the Office of Price Administration, true, full and accurate records as required by Section 20 of Revised Maximum Price Regulation 136, as amended and revised. [4]

4. Judgment on behalf of the United States against defendant in a sum equal to three times the aggregate amount by which the prices received by defendant exceeded the maximum prices provided by Maximum Price Regulation 1, as amended.

5. Such other, further and different relief as to the Court may seem just and proper.

Dated: April 6, 1945.

(Signed) W. H. BRUNNER,

(Signed) RALPH GOLUB,

Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 6, 1945. [5]

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[Title of District Court and Cause.]

### ANSWER TO COMPLAINT

Now comes defendant, Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited, and for answer to plaintiff's complaint on file herein denies and alleges as follows:

#### I.

Defendant denies that he has engaged in actions and practices which constitute violations of Section 4 (a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2nd [6] Sess., c. 26, 50 U.S.C.A., 901 et seq) as amended, hereinafter called the "Act," in that defendant violated Maximum Price Regulation 1, as amended—Used Machine Tools—effective in accordance with the provisions

of the Act; and, therefore, pursuant to Section 205 (a) of the Act.

## II.

Defendant denies all of the allegations contained in paragraph 5, Count One, of said complaint.

## III.

Defendant denies all of the allegations contained in paragraph 4, Count One of said complaint, incorporated by reference into paragraph 3, Count Two of said complaint.

## IV.

Defendant denies all of the allegations contained in paragraph 5, Count Two of said complaint.

## V.

With reference to Count Three, defendant denies that he has engaged in actions and practices which constitute violations of Section 4 (a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2nd Sess., c. 26, 50 U.S.C.A., 901 et seq) as amended, hereinafter called the "Act," in that defendant violated Maximum Price Regulation 136 (8 F. R. 16132), as amended and revised—Machinery and Transportation Equipment—effective in accordance with the provisions of the Act.

## VI.

Defendant denies all of the allegations contained in paragraph 5, Count Three of said complaint.

## VII.

Defendant denies all of the allegations contained in paragraph 2, Count Four of said complaint. [7]



VIII.

Defendant denies all of the allegations contained in paragraph 2, Count Five of said complaint.

Wherefore, said defendant prays to be hence dismissed with his costs.

WALDO F. POSTEL,

Attorney for Defendant. [8]

State of California,

City and County of San Francisco—ss.

Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited, being duly sworn, deposes and says: That he is the defendant in the above-entitled action, that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated upon information or belief, and as to those matters he believes it to be true.

JOE FONTES.

Subscribed and sworn to before me this 31st day of May, 1945.

[Seal]

FLORENCE HANEY,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires May 23, 1949.

Receipt of copy of foregoing answer to complaint admitted this 31st day of May, 1945.

W. H. BRUNNER,

RALPH GOLUB,

Attorneys for Plaintiff.

[Endorsed]: Filed May 31, 1945. [9]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

Complaint for Injunction and Treble Damages

Before: Hon. R. Lewis Brown,  
Judge.

Tuesday, September 4, 1945

Counsel Appearing: For the Plaintiff: A. O. Jepson, Esq. For the Defendant: Waldo F. Postel, Esq.

The Clerk: Bowles vs. Fontes for trial.

The Court: Proceed.

Mr. Jepson: I wanted to make a stipulation, your Honor, to save time, as to the value of the machine tools, and then there is only one question that remains, and that is the question whether it was guaranteed or unguaranteed. [11]

The Court: Haven't you that stipulation prepared already?

Mr. Jepson: I would like to stipulate, with the permission of Defendant's counsel, that the base price of the machine tool involved, which is one Sebastian lathe with a chuck attached, together with the extras, is \$1,956.

Mr. Postel: That is on the 12 inch lathe. They do not make it 13 inch.

Mr. Jepson: I will withdraw that stipulation, if I may. The plaintiff makes a stipulation with the consent of the defendant that the Sebastian geared head, quick change, lathe, direct motor drive, together with one chuck, has a base price of \$1,945.



Mr. Postel: We accept that stipulation and join in it.

The Court: When you say base price do you mean that is the maximum price at which it could be sold under the regulations?

Mr. Jepson: That is the maximum price under the regulation, this being in Class 4, which classified it as to age, and the age of this machine puts it into Class 4.

The Court: That is the maximum price at which it could be sold?

Mr. Jepson: The maximum price, the ceiling price, would be 70 per cent of that for the guaranteed machine and 45 per cent for the "as is" machine.

The Court: You have not answered my question. Is \$1,945 the maximum price at which it could be sold under the regulation? [12]

Mr. Jepson: No, the maximum price under which it could be sold under the regulation would be 70 per cent of that figure if it carried a guarantee, and if no guarantee, 45 per cent.

Will you take the stand, Mr. Fontes?

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JOE FONTES,

called for the plaintiff; sworn.

The Clerk: Q. Please state your name to the Court.

A. Joe Fontes.

(Testimony of Joe Fontes.)

Direct Examination

Mr. Jepson: Q. You are the defendant in this action?

A. Yes, sir.

Q. Under subpoena you were to bring certain records and papers in to this court?

A. Yes. I haven't picked up a subpoena yet, but I have the records.

Q. That have to do with the transaction being the sale of a Sebastian geared head lathe to the Montybex Engineering Company, 1701 Mission Street, San Francisco, California?

A. Yes, sir.

Q. At the time of the sale of that lathe to this company did you or did you not furnish a written guarantee of the satisfactory operation of this lathe for a period of thirty days?

A. At the time that lathe was——

Q. You can answer yes or no.

A. I would like to explain to [13] the Court.

The Court: Answer yes or no and then explain.

The Witness: Did we or did we not serve a written guarantee?

Mr. Jepson: Yes.

The Court: Read the question.

(Question read.)

A. We did not.

The Court: Answer that yes or no.

The Witness: We did not serve a written guarantee. We gave a verbal guarantee.

(Testimony of Joe Fontes.)

The Court: Strike the answer. Answer that question yes or no.

The Witness: Can I explain it?

The Court: Yes, you may explain it after you answer it.

The Witness: No, we did not serve a written guarantee, and I would like to explain it.

The Court: Go right ahead and explain it.

The Witness: At the time that lathe was sold my office man, Mr. Bob Peabody, who made this transaction—I did not make the transaction; it was out of the office in court——

Mr. Jepson: That is objected to.

The Court: It is hearsay. You cannot testify to that if you were not there. Testify to what you know personally.

The Witness: But I made a transaction in that business [14] prior to writing up the order.

The Court: All right, any transaction you had you can testify to.

The Witness: In my transaction with the Monty-bex Company, when I brought that lathe up from Los Angeles, we made a guarantee to the Monty-bex Company that that lathe was guaranteed to be in first class working condition throughout, and if it was not satisfactory they could return it to us.

Mr. Jepson: That is objected to as incompetent, irrelevant and immaterial for the reason that the regulation itself says it must be a written guarantee at the time the sale is made, and the defend-

(Testimony of Joe Fontes.)

ant has testified that there was no written guarantee.

The Court: This is a part of the defendant's explanation. The objection is overruled.

Mr. Jepson: Q. Go ahead.

A. Well, Mr. Montybex said it would be all right if I would guarantee the lathe he would place the order. I was not there to accept the order, so I told Mr. Bob Peabody to write up the order.

The Court: Just a minute. When I tell you to stop, stop.

The Witness: Yes, sir.

The Court: Strike all that part of the answer after "I told Peabody" as being hearsay. You can't testify to [15] something you told somebody else who was not a party to this action, or what somebody told you.

Mr. Postel: If the Court please, I think the witness is not trying to introduce hearsay evidence of what it contains but to tell what he did. In other words, he instructed his employee.

The Court: The Court is not going to consider what he told somebody else or what somebody else told him.

Mr. Postel: No, the question, your Honor, was what did he do.

The Court: That is right.

Mr. Postel: Well, he gave instructions. We are not offering that testimony as to the truth of what he said.

The Court: And it is not going to be received

(Testimony of Joe Fontes.)

no matter on what theory it is offered. It is not going to be received.

The Witness: Can I explain the instructions?

The Court: No, you cannot explain the instructions.

Mr. Jepson: Q. Did you at the time of the sale of that lathe furnish the purchaser with an invoice?

A. Yes.

Q. Have you the copy of that invoice with you?

A. A regular contract. I do not know whether you would call it an invoice. A regular contract.

Mr. Postel: I think you have it, Counsel.

Mr. Jepson: Q. I will hand you that and ask you if that is the contract you refer to?

A. Yes, sir, that is our [16] regular form contract.

Q. That is the original of the contract that was given the purchaser when he bought this machine?

A. Yes, sir.

Mr. Postel: Just a minute, before you answer. I object to that, your Honor, upon the ground the witness testified he was not present at the time the transaction was consummated, that he made the sale, the oral negotiations for the sale of this tool, but the sale itself, together with the delivery of that instrument that he now holds in his hand and the writing of that order was done by somebody else and not in his presence.

The Court: He has identified it as being an original instrument issued in the *court* of his business.

(Testimony of Joe Fontes.)

Mr. Postel: We stipulate that this came out of his shop.

The Court: If that is the case, the objection is overruled.

Mr. Jepson: Q. Is there any place on that instrument or contract that states that the machine is guaranteed in any way for any period of time whatsoever?

Mr. Postel: I object to that. The instrument is the best evidence of what it contains.

The Court: Sustained.

Mr. Jepson: The plaintiff offers in evidence the instrument just testified to by the defendant as an exhibit. [17]

The Court: Admitted.

(The document in question was thereupon received in evidence as Plaintiff's Exhibit 1.)

Mr. Jepson: That is all.

#### Cross Examination

Mr. Postel: Q. Mr. Fontes, it has been stipulated here in open court that the maximum price for this machine tool was \$1,945, 70 per cent of \$1,945.

A. That is right.

Q. Now, the question is, did you sell it within 70 per cent of that maximum price?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 1 and ask you did you prepare that invoice?

A. No, Mr. Peabody.



(Testimony of Joe Fontes.)

Q. Just answer yes or no. A. No.

Q. You did not. Were you there when it was prepared? A. No.

Q. There is another signature on there, Carl E. Beck.

A. That is the owner. That gentleman is here now to testify.

Q. That is the purchaser's signature, is that correct? A. Yes, sir, that is right.

Mr. Postel: That is all.

### Redirect Examination

Mr. Jepson: Q. Mr. Fontes, what did you sell that machine for?

A. What did we sell it for?

Q. Yes. A. At \$1,200.

Q. And that included the chuck.

A. That included the chuck, yes, sir. [18]

Q. Did it include extras that were on it?

A. Motor and switch.

Q. How did you arrive at that price?

A. By taking the OPA book.

Q. Which book?

A. The price book there, this here book, the OPA—the new price book.

Q. What page did you find that on?

A. Page 362.

Q. Will you turn to Page 362 and explain to the Court how you arrived at the price of \$1,200?

The Court: You can just keep your seat. What was that page number?

(Testimony of Joe Fontes.)

A. 362.

Mr. Jepson: Q. Will you just explain how you arrived at the price of \$1,200?

A. Well, it says here, as I said before—can I explain now without any—

The Court: Yes, he asked you how you arrived at the price. Go ahead and tell him how you arrived at the price.

The Witness: We sold a 13 inch by 6 foot Sebastian lathe. Sebastian do not make the 13 inch size any more. They do make a 12 and a 14. So we took the lesser of the two as a comparable size and went by the 12 inch lathe. According to the OPA book, on Page 362, the 12 by 4 Sebastian lathe sells for \$1,795, and they allow one to add \$80 for two feet of additional bed. In that we are also allowed by the OPA regulations to charge for extras. There is an extra here of a 4-jaw chuck that sells for \$71 and \$10 for the back plate that fits on the spinner, making it \$81 complete. Those added [19] together—I do not have the figures here—but I had it added up there—from that we take 70 per cent. That comes to a little over \$1,300. I do not know exactly how much. But we put a price of \$1,200 because it has been the policy of the company to sell always under the ceiling price. But \$1,200 is ample for a lathe of that size.

Q. How old was this machine?

A. Well, we put it in Class 4 because we did not know the exact age, and at the time we made the sale we did not have time to stipulate with the



(Testimony of Joe Fontes.)

factory the exact date, so we put it in Class 4. It may be anything from 15 to 25 years. I don't know.

Q. And Class 4 provides for 70 per cent if the machine is rebuilt and guaranteed and 45 per cent if it is other condition, is that right?

A. That is right, if it is equivalent to rebuilt and guaranteed or if it is in other condition, yes.

Mr. Jepson: I object to the statement to it being equivalent to that.

The Witness: Your book says so.

The Court: Overruled.

Mr. Jepson: Q. So you arrived at what base price then?

A. The total of these figures and 70 per cent of that.

Q. But \$1,945 is the base price that you sent in on Form 1, is that right?

A. Yes, we sent in a form to the OPA stating on the form—we put on the form “Guaranteed,” if [20] you will look at the form.

Q. And you sold it there for \$1,200?

A. \$1,200.

Mr. Jepson: That is all.

Mr. Postel: May I see that form that has just been referred to?

Mr. Jepson: Q. In the interest of time will you show me on this OPA form: one, where it mentions “guaranteed?”

A. In these brackets down here, the X.

Mr. Postel: You have already seen this, Counsel.

(Testimony of Joe Fontes.)

Recross Examination

Mr. Postel: Q. Did you bring this document to the court?

A. No, that is OPA files.

Q. This document came from your office?

A. Yes, sir.

Q. It shows the particular sale and transactions of this Sebastian lathe?

A. By the same man, yes.

Q. It shows on this report in item No. 7 that it is a rebuilt and guaranteed machine, is that correct?

A. That is right.

Mr. Postel: Now, your Honor, I offer this form in evidence, OPA Form 100:1, secondhand machine tool report.

The Court: It will be denied at this time as anticipatory of the defense. If you desire to renew your offer at the time you put on your defense you may do so.

Mr. Jepson: That is all.

Mr. Postel: Just one other question.

Q. Did you instruct your employees, particularly Mr. Peabody, [21] to make any notations on invoices as to whether or not the machine tool was "as is" or guaranteed?

A. Yes, I did.

Q. What—

A. I have told them all to make sure.

Mr. Postel: That is all.

Mr. Jepson: Q. Does that invoice use the word "guaranteed" on it?

(Testimony of Joe Fontes.)

Mr. Postel: The same objection. It speaks for itself.

The Court: The invoice is a paper, Counsel. It speaks for itself.

Mr. Jepson: That is all.

The Witness: I would like to explain to the Court.

The Court: That is all. Step down.

Mr. Jepson: That is the plaintiff's case, your Honor.

(The defendant resumed the stand.)

Mr. Postel: Shall I proceed, your Honor? I was going to make a motion for a non suit on this, but if the Court wants all the facts—I do not quite understand the theory of the plaintiff's case in this matter. Is it because an employee has failed to make a certain notation on a form? Is that the whole question involved?

The Court: Of course, the procedure is up to you as to whether you desire to make a motion for a non suit or intend to proceed.

Mr. Postel: Well, I had better proceed. I do not want to jeopardize the interests of my client in this matter. [22]

The Court: All right, you may proceed, Counsel.

Mr. Postel: Q. Mr. Fontes, I show you a document, which was brought into court by Counsel for the plaintiff in this case, being OPA Form 100:1, entitled "Secondhand Machine Tool Report," with the signature, "R. A. Peabody, Sales Manager,"

(Testimony of Joe Fontes.)

and ask you is that the report you made to the OPA of this particular transaction?

A. Yes, sir.

Q. At the time that report was sent in was it in the same condition as it is today, Item 7, reporting the sale as a rebuilt and guaranteed sale?

A. That is right.

Mr. Postel: I offer this in evidence, your Honor.

The Court: It is admitted.

(The document in question was thereupon received in evidence as Defendant's Exhibit A.)

Mr. Postel: Q. Now, Mr. Fontes, I show you a pad of invoice, somewhat similar but not exactly similar to Plaintiff's Exhibit 1, and ask you is this the form you are now using in making the sales of guaranteed machine tools regulated by OPA prices?

Mr. Jepson: That is objected to.

The Court: Overruled. He is asking him a question now that the witness can answer yes or no.

A. Yes, this is the form we are now using.

Mr. Postel: That form is different from the one just showed you that was offered in evidence by the plaintiff? [23] Yes or no.

A. Yes, it is different.

Q. Were any changes made in the form suggested by counsel for the OPA, the pad of forms you have in your hand? A. Yes.

Q. Were these suggestions made after this transaction now before the court was investigated by the OPA? A. Yes.

(Testimony of Joe Fontes.)

Q. And was the language of that form suggested by the OPA? A. Yes, this one line.

Mr. Postel: I offer this in evidence and read this one line: "All machine tools above described are equivalent to rebuilt and are guaranteed in accordance with OPA regulations unless otherwise specified 'as is.' " I offer this pad in evidence, your Honor.

The Court: Q. Are all the forms similar on that pad?

A. Yes.

Mr. Postel: They are numbered from 1079 to 1100, inclusive.

The Court: If you offer just one form it will meet the same purpose for the record.

Mr. Postel: I offer the form No. 1079.

The Court: It will be admitted.

(The document was thereupon received in evidence as Defendant's Exhibit B.)

Mr. Postel: I think that is all.

Mr. Jepson: No cross-examination. [24]

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CARL BECK,

called for the defendant; sworn.

The Clerk: Q. Please state your name to the Court.

A. Carl Beck.

(Testimony of Carl Beck.)

Direct Examination

Mr. Postel: Q. What is your business, Mr. Beck?

A. Machine shop owner.

Q. In San Francisco? A. Yes.

Q. How long have you been in that business?

A. Almost two years.

Q. Do you know Joe Fontes, the witness who just left the stand? A. Yes, sir.

Q. Do you know that he is in the used machine tool business? Is that correct? A. Yes.

Q. You have a machine shop?

A. Yes, sir.

Q. You and your partner? A. Yes, sir.

Q. You heard his testimony; you have been in court right along, have you not? A. Yes, sir.

Q. Are you the gentleman or one of the parties who bought this Sebastian lathe from Joe Fontes' machine company? A. Yes, sir.

Q. I will show you Plaintiff's Exhibit No. 1, the invoice with the name, "Carl E. Beck" on here. Is that your signature? A. That is right. [25]

Q. You were the folks who purchased this machine tool? A. That is right.

Q. Do you remember what you paid for it?

A. \$1,200.

Q. Was this machine sold to you by the defendant in this action as a guaranteed or as an "as is" machine? A. Guaranteed.

Mr. Postel: That is all.



(Testimony of Carl Beck.)

Cross Examination

Mr. Jepson: Q. Is your name Mr. Beck?

A. Yes, sir.

Q. Was that guarantee that you got on that machine in writing? A. No, that was verbally.

Q. When did he give you the verbal guarantee? A. At the time we bought it.

Q. Was it invoiced to you as rebuilt?

Mr. Postel: I object to that. The invoice is in evidence.

The Court: Sustained. The invoice speaks for itself.

Mr. Jepson: Q. You received no written guarantee at any time from Mr. Fontes on that machine?

A. Not that I can remember. I did not take care of the books in it at all. My other partner took care of that. I just remember the sale.

Q. There was nothing said between you and Mr. Fontes in regard to a written guarantee?

A. Not that I remember.

Q. You never asked for one? A. No.

Mr. Jepson: That is all. [26]

Redirect Examination

Mr. Postel: Q. Is it a fact that after the machine was purchased and delivered to you and being used by you, you had a part replaced by Fontes?

A. Yes.

Q. What part?

A. We had three parts replaced.

Q. Any additional charge for them?

(Testimony of Carl Beck.)

A. No, sir.

Q. And that is the same practice in the case of a guaranteed machine, is that right?

A. Yes, sir.

Q. If a machine is sold as is you would have to pay for those extra parts, would you not?

A. Yes, sir.

Mr. Postel: That is all, your Honor.

The Court: Step down.

Mr. Jepson: That is all.

The Court: Proceed, gentlemen.

Mr. Jepson: That is all, the plaintiff rests.

Mr. Postel: We rest. Submitted, your Honor, so far as the defendant is concerned.

Mr. Jepson: I would like to make a short argument, if I may.

The Court: All right.

(Counsel for the respective parties then presented their closing arguments, after which the matter was submitted.)

### CERTIFICATE OF REPORTER

I, J. J. Sweeney, Official Reporter, certify that the foregoing 17 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

J. J. SWEENEY.

[Endorsed]: Filed Sept. 4, 1945. [27]



District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 8th day of September, in the year of our Lord one thousand nine hundred and forty-five.

Present: the Honorable R. Lewis Brown,  
District Judge.

[Title of Cause.]

This case heretofore having been submitted to the Court for consideration and decision, it is Ordered, in accordance with findings and judgment entered and filed this day, that plaintiff do have and recover from defendant the sum of \$974.25, together with costs. [28]

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be heard before the Court on the 4th day of September, 1945, Honorable R. Lewis Brown, Judge presiding, sitting without a jury. The plaintiff was represented by his counsel, A. O. Jepson, and the defendant, Joe Fontes, was present in person and represented by

his counsel, Waldo F. Postel. Thereupon oral and documentary evidence was introduced by and on behalf of each of the parties to the action and at the close of all of the evidence the cause was argued by the respective counsel to the Court and thereupon submitted to the Court for consideration and decision, and the Court having considered all of the evidence introduced and the arguments of counsel and being fully advised in the premises now makes and orders filed the following Findings of [29] Fact and Conclusions of Law, viz:

## FINDINGS OF FACT

### I.

That the defendant, during the times mentioned in the complaint, was engaged in business in the city and county of San Francisco, State of California, selling and offering to sell used machine tools to purchasers purchasing them in the course of trade or business.

### II.

That during the times mentioned in the complaint, Maximum Price Regulation No. 1, issued by the Administrator of the Office of Price Administration on the 20th day of July, 1943, and effective July 26, 1943, and establishing maximum prices for the sale of second hand machine tools and extras, was in full force and effect.

### III.

That on the 6th day of April, 1944, the defend-

ant offered to sell, and did sell for the sum of \$1200.00, one 13" x 6' Sebastian Geared Head, Quick Change Lathe and one chuck; that the said lathe and chuck, so offered for sale and sold by the defendant, was a second hand machine tool and the conditions of its said sale and the maximum price at which it could be sold were, at the time of said sale, controlled and regulated by said Maximum Price Regulation No. 1 hereinabove referred to.

#### IV.

That at the time of said sale as aforesaid, the base price of the said lathe and chuck so sold was the sum of \$1945.00.

#### V.

That at the time of the sale and delivery of the said lathe the same was not rebuilt by the defendant within the meaning of that term as used in Section 3-c) of said Maximum Price Regulation No. 1, and was not invoiced as such, and that no binding written guarantee [30] of satisfactory performance for a period of not less than thirty days from the date of shipment, or no written guarantee of any kind guaranteeing performance for any number of days from date of shipment, was executed and delivered by the defendant to the purchaser of said lathe.

#### VI.

That the sum of \$1200.00, charged and received by the said defendant for said lathe and chuck from said purchaser, was more than 45% of the base price of the said lathe and chuck, the sum of \$1945.00.

## VII.

That at the time of the sale and delivery of the said lathe and chuck to the purchaser, the defendant gave to the purchaser a verbal guarantee of performance and thereafter observed said guarantee by repairing at his own cost and expense the said lathe at the request of the purchaser.

## VIII.

That the maximum price the defendant was permitted to receive for the said lathe and chuck, upon the sale thereof, the same being not rebuilt and with a written guarantee, was the sum of \$875.25.

## IX.

There is no evidence that the defendant sold or offered to sell any used machine tools at prices in excess of those fixed by the regulation, except the one machine tool hereinabove described in these Findings of Fact.

## X.

That the defendant has not engaged in any actions or practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 other than in connection with the sale of the one machine tool described in these Findings.

## XI.

There is no evidence that the defendant violated the regulation in that he sold and offered to sell second hand machines and parts [31] without following the pricing practices as required by Section

1390.11 of the Regulation, except for the sale of the one machine tool hereinabove described.

## XII.

The allegations of Paragraph 2, Count Five of the Complaint are not sustained by the evidence.

## XIII.

That prior to the trial of this action the defendant, in consultation with and at the consent of agents of the plaintiff and of the Office of Price Administration, adopted and is using now in his business a form of invoice and written guarantee approved by the agents of the plaintiff and of the Office of Price Administration to obviate any further violations.

## XIV.

That there is no evidence that the defendant has violated the Regulations in any respect except in the one instance in the sale of the one machine tool, and there is no evidence that the defendant has threatened to or intends or will in the future violate the regulations of the plaintiff or of the Office of Price Administration.

From the foregoing Findings of Fact the Court draws the following

## CONCLUSIONS OF LAW

### I.

That the Court has jurisdiction hereof.

### II.

That the plaintiff is entitled to a judgment against

the defendant in three times the amount of \$324.75, the excess charged and received by the defendant over the maximum price fixed for the sale of the said machine tool and part without a written guarantee therefor.

## III.

That the plaintiff is not entitled to a decree of permanent and final injunction or of any injunction whatsoever against this defendant as prayed for in his complaint.

Done and dated this 8th day of September, 1945.

R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed Sept. 8, 1945. [32]

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In the United States District Court for the Northern District of California, Southern Division.

No. 24635-G

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Plaintiff,

vs.

JOE FONTES, individually and doing business as  
JOE FONTES MACHINERY COMPANY,  
LIMITED,

Defendant.

## JUDGMENT

This cause came on regularly to be heard before the Court on the 4th day of September, 1945, the



Honorable R. Lewis Brown, Judge presiding, without a jury. The plaintiff was represented by his counsel, A. O. Jepson, and the defendant, Joe Fontes, was present in person and represented by his counsel, Waldo F. Postel. Thereupon oral and documentary evidence was introduced by and on behalf of each of the parties to the action and at the close of all of the evidence the cause was argued to the Court by counsel for the respective parties and at the close of the argument the same was submitted to the Court for consideration and decision and the Court having fully considered the same and being fully advised in the premises thereafter made, signed and ordered filed its Findings of Fact and Conclusions of Law, which said Findings of Fact and Conclusions of Law, so made and filed as aforesaid, are hereby referred to and by such reference made a part [33] hereof.

Wherefore, by reason of the law and the evidence and the premises and the Findings of Fact and Conclusions of Law of the Court, It Is Ordered and Adjudged and this does order and adjudge that the plaintiff, Chester Bowles, Administrator, Office of Price Administration, do have and recover of and from the defendant, Joe Fontes, individually and doing business as Joe Fontes Machinery Company Limited, the sum of Nine Hundred Seventy-four and 25/100 Dollars (\$974.25), together with plaintiff's costs and disbursements herein taxed in the sum of .....

Done and dated this 8 day of September, 1945.

R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed Sept. 8, 1945. [34]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES  
CIRCUIT COURT OF APPEALS, NINTH  
JUDICIAL CIRCUIT.

Notice Is Hereby Given that Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Judicial Circuit from the final judgment entered in the above-entitled action on the 8th day of September, 1945.

WALDO F. POSTEL,

Attorney for appellant, Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited.

[Endorsed]: Filed Oct. 5, 1945. [35]



[Title of District Court and Cause.]

DESIGNATION OF RECORD DESIRED  
ON APPEAL

To C. W. Calbreath, Clerk of the District Court of the United States in and for the Northern District of California, Southern Division.

The defendant above-named, to-wit: Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited, in compliance with Rule 75 of the Federal Rules of Civil Procedure, hereby and herein designates the entire record in the above entitled cause as a record on appeal in the Circuit Court of Appeals for the Ninth Circuit.

Please certify to the Circuit Court of Appeals for the Ninth Circuit the following papers and documents:

1. The original Reporter's transcript of testimony. [36]
2. All original exhibits.
3. Original complaint.
4. Original answer of defendant to plaintiff's complaint.
5. Order for judgment in favor of plaintiff and against defendant.
6. Order for entry of judgment.
7. Findings of fact and conclusions of law.
8. Final judgment in favor of plaintiff and against defendant.

## 9. Notice of appeal.

Dated at San Francisco, California, this 8th day of October, 1945.

WALDO F. POSTEL,  
Attorney for defendant and appellant, Joe Fontes,  
individually and doing business as Joe Fontes  
Machinery Company, Limited.

Receipt of copy of the foregoing designation of  
record desired on appeal admitted this ..... day of  
October, 1945.

W. H. BRUNNER,  
RALPH GOLUB,  
A. O. JEPSON,  
Attorneys for Plaintiff.  
By R. BINGHAM.

[Endorsed]: Filed Oct. 8, 1945. [37]

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[Title of District Court and Cause.]

## ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the Appellant herein  
may have to and including December 24, 1945, to  
file the Record on Appeal in the United States Cir-  
cuit Court of Appeals in and for the Ninth Circuit.

Dated: November 14, 1945.

LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed Nov. 14, 1945. [38]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including January 3, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: December 22, 1945.

LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed Dec. 24, 1945. [39]

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In the United States Circuit Court of Appeals,  
Ninth Judicial Circuit

No. 24635-G

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Plaintiff,

vs.

JOE FONTES, individually and doing business as  
JOE FONTES MACHINERY COMPANY,  
LIMITED,

Defendant.

PETITION FOR ORDER EXTENDING TIME  
TO FILE TRANSCRIPT OF RECORD ON  
APPEAL.

The petition of Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited, respectively shows:

That your petitioner is appellant in the above-entitled matter and has appealed from a judgment of the District Court of the United States in and for the Northern District of California, Southern Division.

Petitioner alleges that the time within which to file transcript of record on appeal herein expires after the third day [40] of January, 1946.

Petitioner, in support of this application, files herewith the affidavit of Waldo F. Postel, setting forth the reasons for this application.

Wherefore, petitioner prays that an order be made herein extending the time within which appellant may file transcript of record on appeal after the third day of January, 1946.

WALDO F. POSTEL,

Attorney for appellant, Joe Fontes, individually  
and doing business as Joe Fontes Machinery  
Company, Limited.

Ordered time to file record and docket said cause  
extended to Jan. 31, 1946.

(Signed) FRANCIS A. GARRECHT,  
Senior U. S. Circuit Judge.

[Endorsed]: Filed January 9, 1946, Paul P.  
O'Brien, Clerk.

A True Copy. Attest:

[Seal] PAUL P. O'BRIEN,  
Clerk.

[Endorsed]: Filed Jan. 3, 1946. C. W. Cal-  
breath, Clerk. [41]

District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 41 pages, numbered from 1 to 41, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Chester Bowles, Administrator, Office of Price Administration, vs. Joe Fontes, dba Joe Fontes Machinery Co. No. 24635-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$6.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 17th day of January, A. D. 1946.

[Seal]

C. W. CALBREATH,  
Clerk.

(Signed)

E. H. NORMAN,  
Deputy Clerk. [42]

[Endorsed]: No. 11239. United States Circuit Court of Appeals for the Ninth Circuit. Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Ltd., Appellant, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 25, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11239

JOE FONTES, individually and doing business as  
JOE FONTES MACHINERY COMPANY,  
LIMITED,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Appellee.

#### STATEMENT OF POINTS

Appellant intends to rely on appeal upon the following points. It was not contemplated, nor is it

equitable, that the Emergency Price Control Act of 1942, or Maximum Price Regulation (1) as amended—Used Machine Tools, should be so construed that a dealer complying as far as he physically can with all laws, rules and regulations involved, should be penalized because of the failure of an employee, upon the sale of a machine tool and after definite instructions so to do, failed to write the word “guaranteed” on the invoice covering the sale of a single machine tool, the said dealer being engaged in the business of selling and offering to sell used machine tools and it being admitted by the findings and the judgment that there were no other violations.

It appears from the evidence that the machine tool involved was orally and verbally guaranteed by the seller, the appellant, that the purchaser purchased the same as a guaranteed tool, that the employee of appellant was instructed to write the word “guaranteed” on the invoice and that the purchaser actually received free service or replacements customarily allowed in the trade upon the sale of guaranteed machine tools and not customarily allowed upon the sale of machine tools “as is,” as distinguished from “guaranteed.”

In view of the fact that appellant did not personally fill out the invoice or deliver it to the buyer, that the buyer purchased the said tool as guaranteed and enjoyed the benefits accruing to such guarantee and the fact that the appellant, after the sale, reported the said sale to the Office of Price Admin-



istration on the form provided by said Office of Price Administration, as a sale of a "guaranteed" tool, no judgment should have been rendered against him.

There is no vestige of any intent on the part of appellant to violate any provision of the laws or regulations involved. The evidence is to the contrary.

The District Court Judge erred in giving judgment to appellee in the amount of \$974.25 or in any sum whatsoever. Judgment should have been rendered for appellant.

WALDO F. POSTEL,  
Attorney for Appellant.

Service of copy of this designation acknowledged this 25th day of January, 1946.

HERBERT H. BENT,  
Attorney for Appellee.

[Endorsed]: Filed January 26, 1946. Paul P. O'Brien, Clerk.